

Sutter Roseville Medical Center and California Nurses Association, Petitioner. Case 20-RC-17144

August 11, 1997

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered objections to an election held on September 26 and 27, 1996, and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 195 for the Petitioner, and 101 against, with 80 challenged ballots, a number insufficient to affect the outcome of the election.

The Board has reviewed the record in light of the exceptions and briefs and has decided to adopt the Acting Regional Director's findings and recommendations, to the extent consistent with the rationale set forth in this decision, and finds that a certification of representative should be issued.

The Petitioner seeks to represent a unit of all the Employer's registered nurses, including those designated as clinical partners. The Employer contends that all clinical partners are supervisors within the meaning of Section 2(11) of the Act and must be excluded from the unit. This supervisory issue, and objections by the Employer to the prounion activities of some clinical partners, have been the main points of contention in this proceeding.

After an extensive preelection hearing, the Regional Director for Region 5 issued a Decision and Direction of Election finding that the clinical partners were not statutory supervisors and thus were eligible to vote in the unit as defined. The Employer filed a request for review of this determination with the Board. On September 27, 1996, the Board issued an Order stating that the request for review had raised

substantial issues with respect to the Regional Director's finding that the Clinical Partners' role in hiring and transfers does not establish supervisory authority. However, the Board believes that this issue can best be resolved through the use of the Board's challenge procedure. Accordingly, the Regional Director's Decision is amended to permit the Clinical Partners to vote subject to challenge, and the Request for Review is denied in this and all other respects. [Fns. omitted.]¹

¹ In light of the number of voters in dispute, Member Higgins stated in dissent that he would have conducted the election and impounded all ballots until the Board resolved the issue of the clinical partners' supervisory status.

As indicated above, a majority of unit employees voted for representation by the Petitioner. The challenged ballots, including those cast by clinical partners, were not sufficient in number to affect the election result. The Employer filed timely election objections reiterating its allegation that the clinical partners were supervisors and further alleging that the prounion activities of clinical partners during the preelection period had interfered with employees' free choice in the election. The Acting Regional Director recommended overruling the Employer's objections in their entirety. Reasoning that the Board had "neither remanded the issue of their [the clinical partners] eligibility to the Region for reconsideration, nor abandoned the conclusions reached in the Decision and Direction of Election," he relied on the Regional Director's preelection report to find that the clinical partners were not supervisors. The Acting Regional Director therefore concluded that the alleged prounion conduct of unit employees was not objectionable.

We agree with the recommendation to overrule the Employer's objections, but we do not rely on the Acting Regional Director's analysis. Based on the record before us, primarily consisting of the evidence introduced at the preelection hearing, we are unable to determine whether clinical partners are statutory supervisors because of their role in hiring and transfers. Assuming arguendo, that clinical partners are supervisors, however, we find that the prounion conduct alleged by the Employer could not reasonably have affected the election.

The prounion activities of statutory supervisors may constitute objectionable conduct warranting setting aside an election in two situations: (1) when the employer takes no stand contrary to the supervisors' prounion conduct, thus leading the employees to believe that the employer favors the union; or (2) when the supervisors' prounion conduct coerces employees into supporting the union out of fear of retaliation by, or rewards from, the supervisors.² Because the Employer undisputedly communicated its antiunion position to its employees, the issue in this case concerns the latter situation.

The evidence submitted by the Employer in support of its objections consists of an affidavit from Dorothea Dix, director of Telemetry, Oncology, and Special Care, and copies of two letters allegedly distributed to the Employer's registered nurses. Viewing this evidence in a light most favorable to the Employer, it shows: that the names of 19 clinical partners appeared in a list of 52 registered nurses who endorsed the Petitioner; that brief, individual written statements of support by 7 clinical partners appeared with similar statements by other unit nurses in a union campaign document; and that clinical partners, unidentified by name

² *U.S. Family Care San Bernardino*, 313 NLRB 1176 (1994).

or in number, were present at various polling places during the election. The Employer has supplemented this evidence with an offer to prove, through the testimony of two clinical partners, that clinical partners solicited authorization cards on behalf of the Petitioner, expressed their support for unionization at employee meetings sponsored by the Petitioner, and urged other nurses to vote for the Petitioner. The Employer further offers to prove, through the testimony of care coordinator Dorothy Hoffman, that a clinical partner told Hoffman that her job would be protected if she voted for the union.

The Employer's evidence and offer of proof fail to establish a *prima facie* case of objectionable prounion supervisory conduct. Initially, we emphasize that, although the Employer's objections alleged that clinical partners coerced employees by promising benefits if they voted for the Petitioner and by threatening reprisals if they voted against it, the Employer has presented no evidence whatsoever of threats or promises of benefits by clinical partners. The absence of such evidence is significant in considering the conduct that the Employer has specifically identified. As to the solicitation of authorization cards, such activity by supervisors is not objectionable where, "nothing in the words, deeds, or atmosphere of a supervisor's request for authorization cards contains the seeds of potential reprisal, punishment or intimidation."³ Similarly, supervisory statements endorsing the union and pointing out the possible benefits of union representation, including the possibility of better wages and benefits and protection from job loss, are not inherently coercive and are not objectionable when made without threats of retaliation or reward.⁴ In these circumstances, such statements are "permissible expressions of personal opinion."⁵

Furthermore, in analyzing the impact of prounion supervisory conduct on an election, the Board also considers the nature and degree of authority possessed by those engaged in the prounion activity, and their concomitant ability to reward or punish unit employees.⁶ The clinical partners here have no supervisory authority over their nursing peers in the bargaining unit at issue in this election proceeding. Their supervisory authority, if it exists, is limited to the hiring and transfer of technical and service employees who are represented in a separate bargaining unit. Thus, not only is there no evidence that clinical partners made threats or promises of benefits when engaged in prounion ac-

tivities, there also is no evidence that other unit nurses would reasonably believe that clinical partners had any direct ability to punish or reward them for their attitude toward the Petitioner.

There remains for our consideration only the Employer's objection alleging the coercive presence of clinical partners in the polling places during the election. The Employer has not alleged or submitted evidence identifying any specific conduct by clinical partners in these areas that interfered with the election process. It therefore rests on the contention that the mere presence of supervisors had a coercive effect. Having specifically directed that clinical partners be permitted to vote subject to challenge in the election, we certainly cannot find that their presence at the polls during the election is *prima facie* evidence of objectionable conduct. How else were they supposed to cast their challenged ballots? Moreover, we reiterate that clinical partners have no supervisory authority over their nursing peers in the bargaining unit. Unit nurses observing and being observed by clinical partners at the polls would not reasonably tend to be coerced in their electoral choice by the presence of coworkers who had no control over them and were also there to vote.

Based on the foregoing, we find that the Employer has failed to prove its objection allegations or to present *prima facie* evidence that any substantial and material issues of fact exist that would warrant a hearing. Accordingly, without resolving the issue of clinical partners' supervisory status, we adopt the Acting Regional Director's recommendation to overrule the Employer's objections and to certify the Petitioner's representative status.⁷

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the California Nurses Association, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

³ *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148, 1151 (5th Cir. 1980). Accord: *Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 405 (8th Cir. 1985). See also *NLRB v. Hawaiian Flour Mill, Inc.*, 792 F.2d 1459, 1463-1464 (9th Cir. 1986).

⁴ *U.S. Family Care San Bernardino*, supra at 1176; *Sil-Base Co.*, 290 NLRB 1179, 1181 (1988).

⁵ *Wright Memorial Hospital v. NLRB*, supra.

⁶ E.g., *Cal-Western Transport*, 283 NLRB 453, 455 (1987), enf'd, 870 F.2d 1481 (9th Cir. 1989).

⁷ As previously stated, we are unable to resolve the issue of the clinical partners' supervisory status based on the record before us. In these circumstances, another hearing, or at least an opportunity for the parties to present additional evidence, would be necessary to determine this issue. Holding such a hearing would not change the result of the election because the clinical partners' challenged ballots are nondeterminative and we have found that, even if they are supervisors, they did not engage in objectionable conduct. We therefore see no basis for frustrating the majority choice of undisputed unit employees by delaying the Petitioner's certification. We recognize the uncertainty created by the continuing debate over the inclusion of clinical partners in the unit, but this uncertainty can be resolved through the bargaining process or through the timely filing of a unit clarification petition.

All Registered Nurses employed by the Employer, including all Registered Nurses employed at Sutter VNA Roseville Home Health and Sutter Hos-

pice Roseville, but excluding all other employees, guards and supervisors as defined in the Act.